No. 15835

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD DOUGLAS FURNISH,

Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Appellee.

Petition to Review a Decision of the United States District Court.

APPELLEE'S BRIEF.

EDMUND G. BROWN,
Attorney General of the State of California,

JAMES L. MAMAKOS,
Deputy Attorney General,
600 State Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 15835

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD DOUGLAS FURNISH,

Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Appellee.

Petition to Review a Decision of the United States District Court.

APPELLEE'S BRIEF.

Statement of the Case and Statement of Facts.

After appellant was charged with having been convicted of two counts of violation of Title 26 U. S. C. Sec. 145(b), felonies, in violation of Section 2383 of the Business and Professions Code of the State of California, the appellee, the Board of Medical Examiners of the State of California, on November 10, 1955 suspended the appellant from the practice of medicine and surgery in the State of California for one year. [Tr. of Rec. pp. 3-4 4-8, 10-11, 36-37.]

Appellant then sought a Writ of Mandate from the Superior Court of the State of California, in and for the County of Los Angeles, to set aside the decision of the Board of Medical Examiners of the State of California. [Tr. of Rec. pp. 12-13.]

After the said Superior Court dismissed appellant's Petition for Writ of Mandate, appellant appealed to the District Court of Appeal of the State of California, which affirmed the Superior Court's judgment dismissing appellant's Petition for Writ of Mandate. [Tr. of Rec. pp. 12-13.]

On April 9, 1957 appellant's Petition for Rehearing in the District Court of Appeal was denied. [Tr. of Rec. p. 13.]

Appellant's application to the District Court of Appeal to grant a rehearing on its own motion was denied on April 19, 1957. [Tr. of Rec. p. 13.]

On May 15, 1957 appellant's Petition for Hearing in the California Supreme Court was denied by said California Supreme Court. [Tr. of Rec. p. 13.]

Furnish v. Board of Medical Examiners, 149 Cal. App. 2d 326, 333; 308 P. 2d 924; 309 P. 2d 493.

Appellant's Petition for Writ of Certiorari in the Supreme Court of the United States was denied on October 14, 1957. [Tr. of Rec. p. 13.]

Furnish v. Board of Medical Examiners of the State of California, 78 S. Ct. 37, 2 L. Ed. 2d 40.

On November 18, 1957 appellant's Petition for Rehearing of appellant's Petition for Writ of Certiorari was denied by the United States Supreme Court. [Tr. of Rec. p. 13.]

Furnish v. Board of Medical Examiners of the State of California, 78 S. Ct. 139, 2 L. Ed. 2d 110.

On November 25, 1957 appellant filed a Complaint in the United States District Court, Southern District of California, Central Division, No. 1305-57T, against the Board of Medical Examiners of the State of California seeking declaratory relief and an injunction to restrain the California Medical Board from suspending the appellant from the practice of medicine for one year in the State of California and to declare the rights of appellant. [Tr. of Rec. pp. 3-17.]

On November 25, 1957 the Honorable Ernest A. Tolin, United States District Judge, issued an Order to Show Cause and Temporary Restraining Order, restraining the California Medical Board from suspending appellant from the practice of medicine pending the hearing on the Order to Show Cause. [Tr. of Rec. pp. 17-18.]

On December 4, 1957 the appellee, Board of Medical Examiners of the State of California, filed a Motion to Dismiss for Failure of Appellant to State a Cause Entitling Him to Relief and for Lack of Jurisdiction Over the Subject Matter. [Tr. of Rec. pp. 19-20.]

On December 16, 1957, following a hearing on December 6, 1957, the United States District Court sustained

appellee's motion to dismiss for lack of jurisdiction and entered a Judgment of Dismissal for Lack of Jurisdiction Over the Subject Matter. [Tr. of Rec. pp. 22-23, 25-46.]

On December 16, 1957 the District Court granted appellant's motion and made an Order Restoring and Granting Injunction During Pendency of Appeal, enjoining and restraining the California Medical Board from enforcing its Order of November 10, 1955 suspending appellant from practicing medicine and surgery in the State of California. [Tr. of Rec. pp. 20-21.]

Issues.

Succinctly stated, appellee's major contentions are as follows:

1. The United States District Court does not have jurisdiction to enjoin the enforcement of appellee's order suspending appellant from the practice of medicine and surgery in the State of California for one year. Appellant's complaint in the District Court and his Opening Brief before this Honorable Court fail to disclose the basis upon which the District Court had jurisdiction to entertain said complaint.

2. The Doctrine of *Res Judicata* prevents appellant from relitigating the propriety of appellee's order suspending appellant for one year from the practice of medicine and surgery in the State of California.

ARGUMENT.

I.

The District Court Does Not Have Jurisdiction Over the Subject Matter in the Instant Case.

On November 10, 1955 the Board of Medical Examiners of the State of California made an order suspending appellant for one year from the practice of medicine and surgery in the State of California. [Tr. of Rec. pp. 3-4.] This order was promulgated after appellee found that appellant had been convicted of two counts of violation of Title 26 U. S. C. Sec. 145(b), felonies, in violation of Section 2383 of the Business and Professions Code of the State of California. (App. Op. Br. pp. 2-3.) Following appellee's order appellant:

> ". . . exhausted all of his remedies available to him in the State Courts of California, and certiorari was denied by the United States Supreme Court when appellant sought to review the decision of the State Court dismissing appellant's petition for writ of mandate to set aside the decision of the Board of Medical Examiners." [Tr. of Rec. pp. 12-13.] (App. Op. Br. p. 5.)
>
> *Furnish v. Board of Medical Examiners,* 149 Cal. App. 2d 326, 333; 308 P. 2d 924; 309 P. 2d 493 (certiorari denied 78 S. Ct. 37, 2 L. Ed. 2d 40; rehearing denied 78 S. Ct. 139, 2 L. Ed. 2d 110).

Appellant filed his complaint against appellee in the District Court, seeking declaratory relief and an injunction to restrain appellee from executing its order suspending appellant from the practice of medicine and

surgery in the State of California for one year after the United States Supreme Court denied appellant's Petition for Rehearing of his Petition for Writ of Certiorari on November 18, 1957. [Tr. of Rec. pp. 13, 17; App. Op. Br. pp. 1, 5.]

It is respectfully submitted that since appellant has exhausted his remedies in the California State Courts and having been denied review by the United States Supreme Court, he cannot now obtain a review of appellee's order by an independent suit in a federal District Court.

The federal District Courts do not derive their jurisdiction directly from Article III of the United States Constitution but are created by and acquire their jurisdiction from Acts of Congress.

Gillis v. State of California, 293 U. S. 62, 66; 55 S. Ct. 4; 79 L. Ed. 199;

Kline v. Burke Const. Co. 260 U. S. 226, 233-234; 34 S. Ct. 79; 67 L. Ed. 226; 24 A. L. R. 1077;

Briggs v. United States Machinery Co., 239 U. S. 48; 365 S. Ct. 6; 60 L. Ed. 138;

Seligman's Inc. v. United States, 30 Fed. Supp. 895, 900.

A judgment of a state court cannot be reviewed by a bill in equity in a federal court.

American Surety Co. v. Baldwin, 287 U. S. 156, 169; 53 S. Ct. 98; 77 L. Ed. 231; 86 A. L. R. 298;

Chirillo v. Lehman, 38 Fed. Supp. 65, 67 (affirmed 312 U. S. 662, 61 S. Ct. 741, 85 L. Ed. 1108);

Baker Driveaway Co. v. Hamilton, 29 Fed. Supp. 693, 694;

Ritholz v. North Carolina State Board, 18 Fed. Supp. 409, 413.

Neither the District Court nor the Circuit Court of Appeals has power by way of review or otherwise to relitigate issues tried and determined by the state court.

Continental National Bank v. Holland Banking Co., 66 F. 2d 823, 829.

In *Davega-City Radio v. Boland,* 23 Fed. Supp. 969, plaintiff brought action to enjoin the New York State Labor Relations Board from enforcing against the plaintiff a New York labor law. A court of three judges was convened.

The District Court of three judges in granting defendant's motion to dismiss the complaint stated at page 970:

> ". . . There is also a further reason why the suit must be dismissed, namely, the principle that a decision of a state court may not be reviewed by bill in equity in a federal court. American Surety Co. v. Baldwin, 287 U. S. 156, 164, 53 S. Ct. 98, 100, 77 L. Ed. 231, 86 A. L. R. 298; Lynch v. International Banking Corp., 9 Circ., 31 F. 2d 942, certiorari denied, 280 U. S. 571, 50 S. Ct. 28, 74 L. Ed. 624; Furnald v. Glenn, 2 Cir., 64 F. 49, 54; Ritholz v. North Carolina State Board, D. C. M. D. N. C., 18 F. Supp. 409, 413. Here the plaintiff has presented to the state court the same questions as to the jurisdiction of the state Board that it wishes this court to decide. The issue having been decided adversely to it, its remedy is appeal through the appropriate state courts and, if necessary, review by the Supreme Court of the United States. It cannot obtain a review by this independent suit in the federal court. . . ."

In *Sexton v. Barry,* 233 F. 2d 220, at page 225 the Court declared:

> ". . . What appellant asks is that this court order the District Court to relitigate the same issues which have now been finally disposed of by the Supreme Court of Ohio in a judgment binding on this court. As held by this court in General Exporting Co. v. Star Transfer Line, 6 Cir., 136 F. 2d 329, 335, a federal District Court will not function as a court of review for the state court. The District Court there dismissed an action praying that proceedings in the state court be declared null, void, and of no effect and this court affirmed the decision of the District Court, stating:
>
> " 'The attempt to relitigate in federal courts issues already determined in state courts proceedings has been disapproved in numerous opinions of United States Courts below the grade of the Supreme Court. Ritholz v. North Carolina State Board of Examiners in Optometry, D. C. N. C., 18 F. Supp. 409, 413 (three-judge court); Davega-City Radio v. Boland, D. C. N. Y., 23 F. Supp. 969, 970 (three-judge court); Hall v. Ames, 1 Cir., 190 F. 138, 140, 141; Furnald v. Glenn, 64 F. 49, 54.' "

The fact that appellant has filed a complaint seeking declaratory relief and an injunction does not enlarge the District Court's jurisdiction.

The Declaratory Judgment Act did not enlarge the jurisdiction of the Federal District Courts nor alter the character of the controversies which are the subject of the judicial powers under the Constitution.

In *Clark v. Memolo*, 174 F. 2d 978, the Court at page 980 said:

> "It is well settled that the Declaratory Judgment Act does not confer or extend jurisdiction over an area not already covered, nor can it be used to give relief indirectly which could not be given directly. It does not enlarge the jurisdiction of district courts. (Citing cases.)"

At page 981 the court said:

> "The Declaratory Judgment Act was designed to provide a remedy in a case or controversy while there is still opportunity for peaceable judicial settlement. It was the primary purpose of the act to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated have been properly adjudicated."

See also:

Home Insurance Co. of New York v. Trotter, 130 F. 2d 800, 803.

As hereinabove set forth, appellant is seeking to obtain an injunction from the lower court restraining the enforcement of appellee's order of suspension against appellant after having appealed from appellee's order to the California state Courts.

Furnish v. Board of Medical Examiners, supra, 149 Cal. App. 2d 326, 333, 308 P. 2d 924, 309 P. 2d 493 (cert. den. 78 S. Ct. 37, 2 L. Ed. 2d 40; rehear. den. 78 S. Ct. 139, 2 L. Ed. 2d 110).

Title 28 U. S. C., Section 2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except

as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Title 28 U. S. C., Section 2283, has been construed as prohibiting interference with proceedings for the enforcement of a judgment of a state Court.

Toucey v. New York Life Ins. Co., 314 U. S. 118, 62 S. Ct. 139, 148, 86 L. Ed. 100;

Mills v. Provident Life & Trust Co., 100 Fed. 344.

See,

Hill v. Martin, 296 U. S. 393, 403, 56 S. Ct. 278, 283, 80 L. Ed. 293.

Appellee's order of suspension against appellant has been sanctioned by judgments of California state Courts.

Furnish v. Board of Medical Examiners, supra.

By seeking an injunction against appellee, appellant cannot circumvent the prohibition of Section 2283. It has been expressly determined that the prohibition of Section 2283 cannot be avoided by framing an injunction as a restraint on a party litigant rather than directly against the state Court itself.

H. J. Heinz Co. v. Owens, 189 F. 2d 505, 507 (rehear. den. 191 F. 2d 257; cert. den. 342 U .S. 905, 72 S. Ct. 294, 96 L. Ed. 677; rehear. den. 342 U. S. 934, 72 S. Ct. 374, 96 L. Ed. 696);

Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U. S. 4, 60 S. Ct. 215, 84 L. Ed. 537;

Coeur D'Alene Ry. & Nav. Co. v. Spalding, 93 Fed. 280.

In the *Heinz* case, *supra,* at page 507, this Honorable Court, in discussing Section 2283, said:

> "Many years ago this court construed that section [28 U. S. §2283] as prohibiting interference with proceedings for the enforcement of a judgment of a state court. Mills v. Provident Life & Trust Co., 9 Cir., 1900, 100 F. 344. More recently, the Supreme Court has adhered to the same doctrine saying that 'proceedings in a state court' within the meaning of Section 2283 include 'any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective.' Hill v. Martin, 1935, 296 U. S. 393, 403, 56 S. Ct. 278, 283, 80 L. Ed. 293."

Since the lower federal Courts are Courts of limited jurisdiction and can exercise only such powers as Congress, within the limits of the Constitution, confers upon them, it is incumbent upon the litigant seeking that forum to show that the District Court has jurisdiction to hear the cause.

> Fed. Rules, Civ. Proc., Rule 8(a), 28 U. S. C. A.; *Illinois Terminal R. Co. v. Friedman,* 208 F. 2d 675 (rehear. den. 210 F. 2d 229).

Appellant has failed to comply with Rule 18(2)(b)(1) of Rules of the United States Court of Appeals for the Ninth Circuit in that appellant has not specified to this Honorable Court what statutory provisions, if any, convey jurisdiction to the District Court to entertain the instant matter. Said Rule 18(2)(b) provides that appellant's statement of the pleadings and facts ". . . shall refer distinctly (1) to the statutory provisions believed to sustain the jurisdictions [of the District Court and the United States Court of Appeals for the Ninth Circuit]." Appellant has merely cited Title 28, United States Code, Section 1291, in invoking the jurisdiction of this Honorable

Court but has failed to expressly cite any statutory provisions enlisting the jurisdiction of the District Court. It is submitted that appellant's failure is due to the fact that there is no statute which confers jurisdiction to the District Court to hear the instant matter. As set forth in appellee's Statement of the Case and Statement of the Facts, appellant was disciplined by the appellee for having suffered two felony convictions (two counts of violation of U. S. C. 145(b) in violation of Section 2383 of the Business and Professions Code of the State of California). Thereafter appellant sought review in the appellate Courts of the State of California and having exhausted his state Court remedies, sought Certiorari in the United States Supreme Court. After that Honorable Court denied his Petition for Writ of Certiorari and Petition for Rehearing of his Petition for Writ of Certiorari, appellant brought his Declaratory Relief Complaint and Injunction action before the United States District Court, reasserting in that proceeding the same grievances and re-presenting the same issues to the District Court which he had earlier unsuccessfully lodged with the California State Courts and the United States Supreme Court.

> *Furnish v. Board of Medical Examiners, supra* (149 Cal. App. 2d 326, 333, 308 P. 2d 924, 309 P. 2d 493) (cert. den. 78 S. Ct. 37, 2 L. Ed. 2d 40; rehear. den. 78 S. Ct. 139, 2 L. Ed. 2d 110).

In *Norwood v. Parenteau*, 228 F. 2d 148 (cert. den. 351 U. S. 955, 76 S. Ct. 852, 100 L. Ed. 1478), the facts are strikingly similar to those of the present case. There the appellant brought an action in the United States District Court for the District of South Dakota, seeking to have a decision of the Supreme Court of South Dakota declared null and void and demanding redress from members of the State Board of Examiners in Optometry of

the State of South Dakota, its officers and certain state judges, on the ground that those parties collaborated to wrongfully deprive appellant of his license to practice optometry in the State of South Dakota.

The South Dakota State Board of Examiners in Optometry, after holding a hearing upon an accusation charging appellant with unprofessional conduct, found appellant guilty of a violation of its rules and revoked his license.

The decision of the Board was affirmed by the South Dakota State Courts.

Appellant then brought an action in the United States District Court for the District of South Dakota asserting that the South Dakota statute and the Board rules were repugnant to the Constitution of the United States, that appellant's federal rights were involved and that therefore he was entitled to an injunction against the Board of Optometry from interfering with his practice and damages for instigating the action against him.

From a dismissal with prejudice on the ground that the complaint did not state a cause of action by the District Court, the appellant appealed to the Circuit Court.

The appellant had conceded that his prescribed remedy for an appeal from the South Dakota Supreme Court was to the United States Supreme Court (28 U. S. C., Sec. 1257), but attempted to excuse his failure because of economic reasons.

In affirming the District Court's dismissal (*Norwood v. Parenteau*, 228 F. 2d 148), the Court said, at page 150:

> "The primary grievance which appellant is attacking is the optometry statute, *supra,* which he claims is unconstitutional in that it deprives him of his right to practice his profession and doing by indirection

what it could not do directly. Without further reference to this contention, we must hold that this court and the United States District Courts are not the proper forums to which an appeal from a State Supreme Court may be taken.

"Where an adequate state remedy is available and that remedy is employed, the party using it cannot escape the results of the action by a mere change from state to federal courts. Davega-City Radio v. Boland, D. C. N. Y. 1938, 23 F. Supp. 969; New Jersey Chiropractic Ass'n v. State Board, D. C. N. J. 1948, 79 F. Supp. 327. The state action is *res judicata* to all subsequent actions; there is left only appeal to the United States Supreme Court under Title 28 U. S. C. §1257. American Surety Co. v. Baldwin, 1932, 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231; Mitchell v. First Nat. Bank of Chicago, 1901, 180 U. S. 471, 21 S. Ct. 418, 45 L. Ed. 627; Blythe v. Hinckley, 1899, 173 U. S. 501, 19 S. Ct. 497, 43 L. Ed. 783.

"'*Congress . . . has maintained upon the statute book such provisions as it deemed needful for reviewing judicial proceedings in the state courts involving a denial of federal rights, but has confined them to a direct review by this court, and deferred this until final judgment or decree in the state court of last resort.*' Essanay Film Mfg. Co. v. Kane, 1922, 258 U. S. 358, 361, 42 S. Ct. 318, 319, 66 L. Ed. 658.

"In dealing with '. . . a bill in equity to have a judgment of a circuit court in Indiana, which was affirmed by the Supreme Court of the state, declared null and void, and to obtain other relief dependent on that outcome', the Supreme Court of the United States, in Rooker v. Fidelity Trust Co., 1923, 263 U. S. 413, 44 S. Ct. 149, 68 L. Ed. 362, stated:

" 'Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. Judicial Code, §237, as amended by Act Sept. 6, 1916, c. 448, §2, 39 Stat. 726. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original. Judicial Code, §24.' " (Emphasis added.)

Concluding, the court said, at page 150:

"A federal court cannot enjoin the action of a state court at any stage of the proceedings except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction or to protect or effectuate its judgments. 28 U. S. C. §2283. This prohibition 'is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process.' Hill v. Martin, 1935, 296 U. S. 393, 403, 56 S. Ct. 278, 282, 80 L. Ed. 293. *The state court cannot be ignored.* Lion Bonding Co. v. Karatz, 1923, 262 U. S. 77, 43 S. Ct. 480, 67 L. Ed. 871." (Emphasis added.)

The facts in the *Norwood* case strikingly parallel the facts in the instant case with one significant variation to the instant appellant's detriment. The instant appellant brought his action in the District Court *after* unsuccessfully seeking a Petition for Writ of Certiorari and a Rehearing upon his Petition for Writ of Certiorari from the United States Supreme Court whereas the appellant in the *Norwood* case renounced that right.

See, also,

Collins v. LaClede Gas Company, 237 F. 2d 633, 636.

II.

Appellant Is Barred by the Doctrine of Res Judicata.

The Issues Presented by Appellant's Complaint Have Been Litigated Before the California Courts and the United States Supreme Court; Consequently the Doctrine of Res Judicata Is a Complete Bar to the Instant Action.

Appellant is further precluded from litigating his action by the Doctrine of *Res Judicata.* The identical issues presented in appellant's complaint were heretofore presented to the California State Courts and to the United States Supreme Court.

> *Furnish v. Board of Medical Examiners, supra* (149 Cal. App. 2d 326, 333, 308 P. 2d 924, 309 P. 2d 493) (cert. den. 78 S. Ct. 37, 2 L. Ed. 2d 40; rehear. den. 78 S. Ct. 139, 2 L. Ed. 2d 110).

In *Consolidated Freightways, Inc. v. Railroad Commission of California,* 36 Fed. Supp. 269, plaintiff sought to enjoin Railroad Commission of the State of California from enforcing its order directing plaintiff to cease and desist from charging and collecting rates less than the minimum imposed for the transportation of property in the City and County of San Francisco by defendant. Addressing itself to defendant's first defense of *res judicata, i.e.,* that the subject matter of the action had been litigated before the Supreme Court of California and was therefore *res judicata,* the court at page 270 identified the question before it as:

> "Is an order of the Railroad Commission of the State of California, upheld by the State Supreme Court in its ruling denying a writ of review, a bar to further litigation on the same subject matter in this tribunal?"

In answering this question in the affirmative the Federal District Court cited *Napa Valley Electric Co. v. Railroad Commission of California,* 257 Fed. 197 (affirmed by the Supreme Court, 251 U. S. 366, 40 S. Ct. 174, 64 L. Ed. 310).

In *Napa Valley Electric Co. v. Railroad Commission of California, supra,* at pages 198-199, involving a similar question, the District Court declared:

> "In this state of the case I am unable to perceive how the objection that the action of the state court is conclusive of the controversy, and that plaintiff is now precluded from bringing the same grievance here, may be avoided. It has had its day in court. . . . While it might have sought a review of the decision of the state court at the hands of the Supreme Court of the United States by appropriate proceedings . . . it did not see fit to do so, and it cannot now be heard to litigate the controversy anew in this court. . . ."

See,

State Corporation Commissioner of Kansas v. Wichita Gas Co., 290 U. S. 561, 54 S. Ct. 321, 78 L. Ed. 500;

Railroad and Warehouse Commission of Minnesota v. Duluth Street Railway Co., 273 U. S. 625, 47 S. Ct. 489, 71 L. Ed. 807;

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 43 S. Ct. 353, 67 L. Ed. 659;

Bacon v. Rutland Railway Co., 232 U. S. 134, 34 S. Ct. 283, 58 L. Ed. 538.

In *Detroit & Mackinac Railway Co. v. Michigan Railway Commission,* 203 Fed. 864, the plaintiff sought an injunction in the United States District Court against cer-

tain orders of the Michigan Railway Commission after having litigated these questions in the State Courts. Although many questions were presented, the court found it necessary to consider only one question, *i.e.,* whether or not the matter was *res judicata* by reason of the action of the Michigan State Courts. The court held that the defense of *res judicata* prevented plaintiff from trying the same controversy over again in that court. The decree denying injunction was affirmed by the United States Supreme Court, 235 U. S. 402, 405, 35 S. Ct. 126, 59 L. Ed. 288, 289.

See, also,

Grubb v. Public Utilities Commission, 281 U. S. 470, 50 S. Ct. 374, 74 L. Ed. 972;

Smith v. Duldner, 175 F. 2d 269, 630-631;

Wallace Ranch Water Co. v. Railroad Commission, 47 F. 2d 8;

West Virginia Motor Truck Assn. v. Public Service Commission of West Virginia, 123 Fed. Supp. 206.

In *Hart Steel Co. v. Railroad Supply Co.,* 244 U. S. 294, 299, 37 S. Ct. 506, 61 L. Ed. 1148, the United States Supreme Court stated:

> "This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect. Kessler v. Eldred, *supra.* [206 U. S. 285, 27 S. Ct. 611, 51 L. Ed. 1065]."

Conclusion.

Appellee respectfully submits that the United States District Court properly sustained appellee's motion to dismiss for Lack of Jurisdiction Over the Subject Matter. Upon the record and for the reasons hereinabove stated, appellee requests that the District Court's Judgment of Dismissal for Lack of Jurisdiction Over the Subject Matter be affirmed.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General of the State of California,

JAMES L. MAMAKOS,
Deputy Attorney General,

By JAMES L. MAMAKOS,
Attorneys for Appellee.